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NTSB Order No. EA-4211

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of July, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. H. SCOTT GLASSBURN, Respondent.	Docket SE-12919

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on April 28, 1993, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, on finding that respondent violated 14 C.F.R. 43.13(a) and (b) and 43.15(a)(2) in

[1]The initial decision, an excerpt from the hearing transcript, is attached. Respondent filed a notice of appeal but did not perfect that appeal by filing a brief. Respondent also did not reply to the Administrator's appeal.

returning an unairworthy DC-3 to service.[2] The law judge, however, reduced the suspension of respondent's mechanic certificate from the 120 days sought by the Administrator to 30 days. We deny the Administrator's appeal of the sanction reduction.

The Administrator's evidence established that respondent, as chief inspector for Methow Aviation, a Part 135 air taxi operator

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[2] § 43.13(a) and (b) read:

§ 43.13 Performance rules (general).

(a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in § 43.16. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.

(b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness).

Section 14 C.F.R. 43.15(a)(2) reads:

(a) General. Each person performing an inspection required by Part 91, 123, 125, or 135 of this chapter, shall -

(2) If the inspection is one provided for in Part 123, 125, 135, or § 91.409(e) of this chapter, perform the inspection in accordance with the instructions and procedures set forth in the inspection program for the aircraft being inspected.

using this DC-3 in cargo operations, approved the aircraft for return to service despite the following deficiencies:

1. The horizontal stabilizer de-icer boots were torn, the neoprene was in extremely poor condition, and it was unlikely the pneumatics would have allowed this de-icer to operate. Tr. at 33-35.[3]

2. The emergency exit light at the back cargo door likely would not operate.[4] The battery for the light was corroded and had leaked acid.[5] Tr. at 36-41.

3. There were 3 or 4 missing rivet heads and 1 or 2 missing rivets at eye level on lap seams of the right fuselage. Tr. at 42-49.

4. One cargo loading limitation placard was missing and another was illegible. Tr. at 51.[6]

The Administrator argues that the law judge had insufficient reasons for reducing the sanction by 90 days, but we are not convinced that the law judge erred. The Administrator raises one issue: that the law judge's decision does not satisfy

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[3]No operational tests were performed to determine if the equipment in items 1 and 2 actually did not work. Respondent testified that the de-icer boots, although in poor condition, did function properly and did inflate. Tr. at 267.

[4]Respondent testified that, because the aircraft was reconfigured for cargo only, this door was no longer an air stair door. It was only a cargo, and not an emergency, door. Tr. at 270-271. The record also indicates that, with cargo, this door is not accessible. Tr. at 197-198.

[5]Although the Administrator's witness testified that this acid leak had affected the structural integrity of the aircraft, that testimony was the result of leading questions by counsel. The witness also testified (Tr. at 40), more reliably we think, that he had no knowledge of any effect on the surrounding structure.

[6]There may have been other defects (Tr. at 25, see also Exhibit C-1), but they were not alleged by the Administrator and therefore may not be considered for any purpose in this proceeding.

Administrator v. Muzquiz, 2 NTSB 1474 (1975), and its progeny. Muzquiz holds that, in cases where all of the violations are affirmed, a reduction of the Administrator's intended sanction will only be approved on a showing of clear and compelling reasons. According to the Administrator, not only did the law judge not adequately explain his reasoning, but no clear and compelling reasons to reduce the sanction can be found in this case. The Administrator argues, further, that the fact that there is no clear Board precedent for this case is another reason to defer to the Administrator's choice of sanction, and he argues that other factors -- the carrier's Part 135 air taxi status, and respondent's falsification of maintenance records -- aggravate the violations and warrant heightened sanction.

The Administrator makes no reference in his brief to the FAA Civil Penalty Administrative Assessment Act of 1992, P.L. No. 102-345 (the CP Act). Yet, we have noted on a number of occasions since its passage that the provisions of this Act relating to the deference the Board may owe the FAA's sanction choice undermine continued reliance on Muzquiz. In our notice of proposed rulemaking, Rules of Practice in Civil Penalty Proceedings, 58 FR 11379 (1993), we identified the tension between the CP Act and Muzquiz deference principles.[7] Thus,

[7]See also Administrator v. Oklahoma Executive Jet Charter, Inc. & Curtis, NTSB Order EA-3928 (1993) at 10-11 ("We note first that our newly-granted statutory authority to modify sanction from suspension or revocation to assessment of a civil penalty casts considerable doubt over the continued viability of the Board's self-imposed Muzquiz doctrine."). In that case, we affirmed the law judge's reduction of sanction from revocation,

while we will consider the Administrator's reasoning here supporting his proposed 120-day suspension, we must do so in the context of the following CP Act provision:

> In the conduct of its hearings under this subparagraph, the National Transportation Safety Board shall not be bound by any findings of fact of the Administrator but shall be bound by all validly adopted interpretations of laws and regulations administered by the Federal Aviation Administration and of written agency policy guidance available to the public relating to sanctions to be imposed under this subsection unless the Board finds that any such interpretation is arbitrary, capricious, or otherwise not in accordance with law. The Board may, consistent with this subsection, modify the type of sanctions to be imposed from assessment of a civil penalty to suspension or revocation of a certificate.

We agree with the Administrator that there is no clear Board precedent for a violation of this nature. And, as his recitation suggests, case law provides a wide range of sanction for violations involving the return to service of unairworthy general aviation aircraft and failure to perform proper maintenance on them.[8] We have, however, another tool available to assist us.

Although the Administrator does not address it, he tendered an excerpt from his "Sanction Guidance Table" for this record. See Exhibit C-31. At the hearing, counsel for the Administrator

(..continued)
as proposed by the Administrator, to a civil penalty.

[8]Contrary to the Administrator's argument at the hearing and on brief, we do not find Administrator v. Saylor, 2 NTSB 366 (1973) especially useful. No one would disagree with the sentiment expressed there -- that proper inspections are critical. Yet, that does not assist in determining what degree of sanction is warranted in a particular set of facts. In that case, we imposed a 90-day suspension of respondent's mechanic certificate for a maintenance violation that had severe consequences. An aircraft that had just had an annual inspection crashed on takeoff after an engine failed.

stated that the table recommended certificate suspension anywhere from 30 to 120 days for violations such as are alleged here. Tr. at 168.[9]

Assuming the table has been properly interpreted and posits a 30-120 day suspension here, the law judge proposed the lowest sanction suggested and the Administrator has proposed the highest. The law judge will have had the opportunity to make his judgment after observation of the Administrator's case and first-hand evaluation of the evidence and witness demeanor. These are factors which are traditionally understood to warrant the allowance of some deference by reviewing authorities to the discretionary choices of hearing officers.

Assuming for purposes of discussion that the sanction table is "written agency policy guidance available to the public," the law judge's decision is not entirely inconsistent with FAA guidance because the sanction imposed is within the published range. Further, we do not find that the factors offered by the Administrator on appeal dictate imposition of a penalty at the high extreme of the range suggested by that table. It is evident from the record that there is real dispute over the seriousness

[9]This is not at all clear from the document and there is no further discussion of the issue in the record. The document contains a number of potentially applicable categories and, although two of them ("failure to properly perform maintenance" and "making improper inspection") carry a 30-120 day penalty, there is another that appears equally applicable ("improperly releasing an aircraft to service") that carries with it a less severe 30-60 day penalty range.

of the discrepancies for which violations have been charged.[10] The law judge was within his discretion in forming an opinion on this matter, which he did, in reducing sanction. And, as the Administrator failed formally to charge falsification of records (and, we note, the law judge did not make the findings of fact necessary to support such a charge), we are especially unconvinced by the Administrator's argument that we should consider respondent's falsification of maintenance records as an aggravating factor warranting the longest possible suspension.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and

2. The 30-day suspension of respondent's mechanic certificate shall begin 30 days from the date of service of this order.[11]

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

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[10]See footnotes 3-5, supra. The Administrator's witness testified that the aircraft was safe for this flight. Tr. at 21 and 160. Although in his brief the Administrator argues that, based on the law judge's findings the aircraft would not have been repaired, with an ever-increasing potential for hazard, the thrust of the FAA inspector's testimony was that his unairworthy findings with regard to the four cited items were based more on their being inconsistent with the aircraft's type certificate, than because there was a serious safety concern with the aircraft.

[11]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).